

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP154

Cir. Ct. No. 2011CV143

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SUPERIOR FUEL COMPANY,

PLAINTIFF-RESPONDENT,

V.

CARL GREEN AND DAWN GREEN,

DEFENDANTS-APPELLANTS,

WESSMAN ESTATE, LLC,

DEFENDANT.

APPEAL from an order of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Carl and Dawn Green (collectively “Green”), pro se, appeal a summary judgment in favor of Superior Fuel Company dismissing Green’s counterclaim concerning a propane tank dispute. We affirm.

¶2 The parties executed a “Smart Buy Plan Agreement” whereby Green could purchase Superior Fuel’s leased propane tank. The contract also contained Green’s agreement to purchase all their propane from Superior Fuel during the term of the agreement, and confirmed that only Superior Fuel or someone authorized by Superior Fuel could fill the tank.

¶3 Green allegedly failed to make payments as agreed. On December 8, 2010, Superior Fuel commenced a small claims action seeking a money judgment and replevin of the tank. Green answered the complaint and counterclaimed for \$550.¹ Green filed a subsequent counterclaim on March 18, 2011, seeking \$30,000 in lost income based on an inability “to rent or lease his vacation property due to the actions of Superior Fuel” The matter was moved to the circuit court because this counterclaim exceeded the jurisdictional limits of WIS. STAT. § 799.01.²

¶4 Superior Fuel moved for summary judgment on the counterclaim. After a hearing, the circuit court granted the motion for summary judgment and dismissed the counterclaim. Superior Fuel’s original action proceeded to trial and a verdict was returned in favor of Superior Fuel in the amount of \$3,640.40. This appeal follows.

¹ Wessman Estate, LLC, was also a defendant, but is not a party to this appeal.

² All references to the Wisconsin Statutes are to the 2011-12 version.

¶5 Summary judgment methodology is well-established. We review summary judgment decisions using the same standards and methods applied by the circuit court. Under WIS. STAT. § 802.08(2), a moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶6 At the outset, we note Green's briefs to this court could have been stricken for failing to conform to the requirements of WIS. STAT. RULE 809.19. Green fails to provide citations to the record on appeal, and merely provides several cites to his appendix.³ WISCONSIN STAT. RULES 809.19(1)(d)-(e) require appropriate references to the record and legal authorities. The appendix is not the record. *See United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Pro se litigants are bound to the same appellate rules as attorneys. *Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). In addition, Green's brief merely contains assertions rather than developed arguments. We will not abandon our neutrality to develop arguments. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

³ Superior Oil also violates the rules of appellate procedure by improperly failing to provide references to the parties by name, rather than by party designation. *See* WIS. STAT. RULE 809.19(1)(i).

¶7 Even on the merits, however, Green’s assertions fail. Green argues circuit court bias,⁴ and accuses the court of “trickery and deception,” but fails to support these serious allegations. Our independent review of the record reveals nothing to suggest judicial bias or prejudice against Green. Moreover, judicial rulings alone almost never constitute a valid basis for bias or partiality. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

¶8 Green’s counterclaim merely states that Green was unable to rent or lease their vacation home because of actions of Superior Fuel. The circuit court determined that Green’s counterclaim had provided insufficient proof of a breach of contract. The court stated:

[I]t’s talking about him not being able to lease the vacation property because of the actions of Superior Fuel. It’s not alleging some breach of contract Maybe there is a cause of action for breach of contract that could be adequately alleged or could be amended. The problem is the time for amending the pleadings has long since passed. That was June 1st. There hasn’t been alleged in any particularity the breach of contract. The first thing there’s an argument about breach of contract is regarding the memorandum of law.

¶9 Green insists Superior Fuel was required to file a reply to the counterclaim, and summary judgment was therefore premature. We need not reach this issue. Summary judgment begins with an examination of whether a claim is stated and a factual issue exists. In the present case, the circuit court correctly observed that Green had failed to state a claim for breach of contract.

⁴ Green also alleges “the circuit court judge is bias against [us] based on [our] experience in a previous case.” This contention is unexplained and undeveloped. We shall therefore not consider it. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

See La Crosse v. Jiracek Cos., 108 Wis. 2d 684, 689-90, 324 N.W.2d 440 (Ct. App. 1982).

¶10 Green also argues the circuit court was required to allow amendment of the counterclaim. Green is incorrect. The decision to allow amendment of pleadings is discretionary. *See Leciejewski v. Sedlak*, 116 Wis. 2d 629, 643, 342 N.W.2d 734 (1984). There has been no attempt to show an erroneous exercise of discretion.

¶11 Green's answers to interrogatories averred that Superior Fuel stated it was illegal for any other fuel company to fill the propane tank. However, this is consistent with the parties' contractual obligations. It is also consistent with WIS. STAT. § 101.16(3)(a), which provides, "Except as provided in par. (b), no person, other than the owner of a liquefied petroleum gas container or a person authorized by the owner, may fill, refill, evacuate, or use in any other manner the container for any purpose."

¶12 Quite simply, there was no genuine issue of material fact regarding a cause of action for breach of the contract by Superior Fuel. The circuit court correctly granted summary judgment on the counterclaim.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

